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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10
11 KEVIN BONNER,

12 Plaintiff,

13 v.

14 NORMANDY PARK, and DETECTIVE
15 JOHN LIEVERO

16 Defendants.

CASE NO. C07-962RSM

ORDER DENYING DEFENDANT'S
MOTION FOR NEW TRIAL

17 **I. INTRODUCTION**

18 This matter comes before the Court on “Defendant John Lievero’s Motion for New
19 Trial and Other Relief.” (Dkt. #116). Pursuant to FRCP 59, Defendant argues that a new trial
20 is justified because the jury verdicts were internally inconsistent, Plaintiff’s counsel engaged
21 in attorney misconduct, and the verdict concluding that Defendant used excessive force was
22 against the clear weight of the evidence. Defendant also seeks an order vacating the
23 compensatory and punitive damage awards, or alternatively, a remittitur reducing the awards.

24 For the reasons set forth below, the Court DENIES Defendant’s motion in its entirety.

25 **II. DISCUSSION**

26 **A. Background**

27 The instant motion arises from a six-day jury trial that concluded on November 13,
28 2008 wherein the jury returned a verdict against Defendant Officer John Lievero.

Specifically, the jury found that Officer Lievero used excessive force when he tased Plaintiff Kevin Bonner at the Normandy Park Police Department on April 25, 2005 in violation of Plaintiff's Fourth Amendment rights. (*See* Dkt. #104). The jury awarded \$35,000 in compensatory damages and \$25,000 in punitive damages to Plaintiff. The jury did not find in favor of Plaintiff on his state law assault and battery claims. Shortly after the Court entered the final judgment, Defendant timely filed the instant motion for a new trial.

B. FRCP 59

FRCP 59(a) provides that a “court may, on motion, grant a new trial on all or some of the issues – and to any party . . . after a jury trial, for any reasons for which a new trial has heretofore been granted in an action at law in federal court[.]” FRCP 59(a). The Ninth Circuit has held that “[t]he trial court may grant a new trial only if the verdict is contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or to prevent a miscarriage of justice.” *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007) (internal quotations and citation omitted). District courts have a duty to weigh the evidence as the court saw it upon a motion for a new trial. *See Murphy v. City of Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990).

Based on FRCP 59 and its corresponding case law, Defendant seeks a new trial based on three different reasons. The Court addresses each argument in turn.

1. Inconsistencies

Defendant contends that the jury verdicts were internally inconsistent because the jury found that Defendant used excessive force, but did not commit assault and battery. Therefore Defendant argues that the “two answers cannot coexist [because] they make no sense in the context of the evidence presented in this case.” (Dkt. #116 at 5) (citing *Hundley v. D.C.*, 494 F.3d 1097, 1102 (D.C. Cir. 2007)). However, simply because a jury returns what seemingly may be an inconsistent verdict from a legal perspective does not necessarily mean that a new trial should be granted. *See Zhang v. American Gem Seafoods*, 339 F.3d 1020, 1035-36 (9th Cir. 2003) (collecting cases). It is well-settled that “legally inconsistent verdicts ‘may nonetheless stand on appeal[.]’” *Id.* (quoting *Int’l Longshoremen’s Union v. Hawaiian*

1 *Pineapple Co.*, 226 F.2d 875, 881 (9th Cir. 1955)). Indeed, “a court retains the authority,
2 even in a civil case, to allow an apparently inconsistent verdict to stand.” *Los Angeles v.*
3 *Heller*, 475 U.S. 796, 805 n. 12 (1986) (Stevens, J., dissenting).¹ Only when one legal
4 conclusion is the prerequisite for another should an inconsistent verdict be set aside. *See*
5 *Zhang*, 339 F.3d at 1034.

6 Based upon these well-established principles, the Court finds no reason to disturb the
7 jury’s verdict based on alleged inconsistencies. Although the elements of assault and battery
8 may have similarities to the elements of excessive force from a legal perspective, the jury
9 does not have the benefit of examining these elements from the same legal lens as a trained
10 attorney. This is precisely why the historical and majority rule does not compel a district
11 court to grant a motion for a new trial simply because inconsistencies may exist. It is the
12 province of the jury during a jury trial, and only the jury, to apply the facts with the law given
13 to them. Moreover, it is unequivocally clear that assault and battery is not a prerequisite to
14 finding excessive force, nor is one an affirmative defense for the other. The claims simply are
15 not predicated on one another.

16 Nonetheless, Defendant suggests that *Zhang* and the case law which it stands upon are
17 inapposite because this rule applies only to inconsistent *general* verdicts. Defendant further
18 contends that the verdict form in this particular case was a *special* verdict form because the
19 verdict form in this particular case was labeled as such. However, “[w]here a jury is
20 instructed to apply legal principles and assign liability, the answers to the questions submitted
21 to the jury are not special verdicts, despite the use of those words in the title appended to the
22 form.” *Jarvis v. Ford Motor Corp.*, 283 F.3d 33, 56 (2d Cir. 2002) (internal quotations and
23 citation omitted); *see also Babcock v. General Motors Corp.*, 299 F.3d 60, 63 (1st Cir. 2003);
24 *Morris v. Flaig*, 511 F. Supp. 2d 282, 299 (E.D.N.Y. 2007). The Ninth Circuit has made
25 clear that although “[t]he Federal Rules do not define general verdicts, [they] imply that
26 general verdicts do not involve factual findings but rather ultimate legal conclusions.” *Zhang*,

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28 ¹ The Ninth Circuit has noted that this particular finding in Justice Stevens’ dissent in *Heller* was not
contradicted by the majority opinion. *See Zhang*, 339 F.3d at 1036, n. 9. This Court agrees.

1 339 F.3d at 1031 (citing FRCP 49(b)). “The key is . . . whether the jury announces the
2 ultimate legal result of each claim. If the jury announces *only its ultimate conclusions, it*
3 *returns an ordinary general verdict.*” *Id.* (emphasis added). If on the other hand, it “returns
4 only factual findings, *leaving the court to determine the ultimate legal result, it returns a*
5 *special verdict.*” *Id.* (emphasis added).

6 Here, it is clear that the Court only required the jury to arrive at certain legal
7 conclusions. The verdict form asked the jurors to determine whether Defendant used
8 excessive force in violation of Plaintiff’s Fourth Amendment rights, and whether Defendant
9 committed assault and battery upon Plaintiff. Nowhere in the verdict form did the Court ask
10 the jury for specific factual findings, and nowhere did the Court indicate to the jury that the
11 Court, and not the jury, would be making the ultimate legal conclusion. The jury returned a
12 general verdict in this case, regardless of the label the Court placed on the form.
13 Consequently, the Court finds no reason to grant Defendant’s motion on this ground.

14 **2. Attorney Misconduct**

15 Defendant also argues that a new trial should be warranted because Plaintiff’s counsel
16 engaged in misconduct by making an improper closing argument, and by violating the Court’s
17 order on motions in limine during three different lines of questioning. “To warrant reversal
18 on grounds of attorney misconduct, the flavor of misconduct must sufficiently permeate an
19 entire proceeding to provide conviction that the jury was influenced by passion and prejudice
20 in reaching its verdict.” *Kehr v. Smith Barney, Harris Upham & Co., Inc.*, 736 F.2d 1283,
21 1286 (9th Cir. 1984) (internal quotations and citation omitted). The conduct complained of
22 must have “prevented the losing party from fully and fairly presenting his case or defense.”
23 *Wharf v. Burlington Northern R. Co.*, 60 F.3d 631, 637 (9th Cir. 1995).

24 In the instant case, Defendant claims that Plaintiff’s counsel’s closing argument was
25 “specifically intended to evoke the passion and prejudice of the jury.” (Dkt. #116 at 7).
26 Defendant specifically indicates that Plaintiff’s counsel’s references to tasers and the jury’s
27 role in ensuring that tasers aren’t used freely by police officers throughout his closing was
28 cumulative misconduct. However, there was unequivocally nothing improper about these

1 statements. Closing argument is exactly what its moniker suggests, an argument. It is not
2 opening statement, it is not confined to the jury instructions, and it certainly does not preclude
3 an attorney from making societal references, as Plaintiff's counsel did here. Tasers, if used
4 improperly by police officers, can indeed be a potentially serious issue in our society. And in
5 a case where the primary issue was whether the Defendant's use of a taser was justified,
6 Plaintiff's counsel is absolutely free to argue about the how tasers can be misused by police
7 officers. Defense counsel was free to rebut these statements in her closing, which she did by
8 arguing that her client's use of the taser was reasonable under the circumstances. To prohibit
9 this type of argument would undoubtedly undermine the "wide latitude" attorneys are allowed
10 in closing argument; a latitude that embraces reasonable inferences from the evidence
11 presented at trial. *See U.S. v. Sayetsitty*, 107 F.3d 1405, 1409 (9th Cir. 1997) (citations
12 omitted). Prohibiting such argument would also substantially chill a fundamental role of an
13 attorney to be a zealous advocate for his or her client.

14 Defendant argues, however, that Plaintiff's counsel improperly intertwined the
15 heightened mental state for punitive damages with the fundamental issue of liability in this
16 case. Defendant suggests that Plaintiff's counsel inflamed the passion and prejudice of the
17 jury by infusing Defendant's alleged "evil-intentions" into the objective Fourth Amendment
18 reasonableness inquiry as laid out by *Graham v. Connor*, 490 U.S. 386 (1989). But there is
19 nothing in *Graham* or its progeny that places limits upon closing arguments. In any event, the
20 jury was clearly instructed of the *Graham* factors, and the Court did not include any reference
21 to the "evil-intentions" of Defendant as a factor for the jurors to consider in determining
22 whether Plaintiff's Fourth Amendment rights were violated. (*See* Dkt. #105, Instr. No. 13).
23 The Court additionally provided the jury with a separate punitive damage instruction. (*Id*,
24 Instr. No. 20). Therefore Plaintiff's counsel's arguments regarding Defendant's allegedly
25 "evil-intentions" were proper under this instruction.

26 In addition, the Court does not find any misconduct by Plaintiff's counsel during his
27 questioning of either Chief Rick Keiffer or Sergeant Tom Ovens. The allegedly improper
28 cross-examination of Sergeant Ovens by Plaintiff's counsel is moot for purposes of this

1 motion because Defense counsel objected to this inquiry during trial, and the Court sustained
2 the objection. With respect to Plaintiff's counsel's inquiry of Chief Keiffer, Defense counsel
3 did not object during trial. In any event, neither line of questioning by Plaintiff's counsel
4 comes remotely close to tainting the trial in any way. Both parties were given more than
5 sufficient time to develop their arguments during this six-day trial, and Defendant was
6 absolutely able to "fully and fairly present[] his case or defense." *Wharf*, 60 F.3d at 637. As
7 a result, a new trial shall not be granted on this ground.

8 **3. Clear Weight of the Evidence**

9 Lastly, Defendant argues that a new trial must be granted because the verdict was
10 against the clear weight of the evidence presented by the case. This argument is also
11 misguided. Determining "the clear weight of the evidence" is a fact-specific endeavor, and an
12 appellate court will generally not reverse the denial of a new trial motion if there was some
13 reasonable basis for the jury's verdict. *See Molski*, 481 F.3d at 729 (collecting cases).

14 Here, there was clearly a reasonable basis for the jury to conclude that Plaintiff's
15 Fourth Amendment rights were violated. As Plaintiff's counsel indicates, a reasonable juror
16 could easily conclude that (1) tasing an individual whom the officer knows is unarmed, (2)
17 inside a police station with two other officers present, and (3) in a small hallway where the
18 officers have admittedly secured control over the individual, is unreasonable and a violation
19 of the individual's Fourth Amendment right to be free from excessive force. A jury could
20 further conclude that this Plaintiff posed no flight risk, and was not an immediate threat to
21 officer safety. Indeed, this Court denied Defendant's motion for summary judgment on
22 Plaintiff's excessive force claim because there was a question of fact as to whether
23 Defendant's use of force was justified. (*See* Dkt. #63, pp. 9-13).

24 Defendant nevertheless highlights that Plaintiff's testimony that he was tased five
25 times flies in the face of the taser download data that establishes that only two taser
26 discharges occurred. Defendant overlooks the simple fact that a taser discharge cycle lasts
27 approximately five seconds. Furthermore, the taser discharge employed in this case was not
28 the type where barbs are released from a distance, but rather the type of discharge where pain

1 is felt upon the taser's contact with the body. Thus, a reasonable juror could conclude that
2 Plaintiff's testimony that he was tased multiple times was consistent with the taser download
3 data, because Defendant may have applied the taser in more than two different areas of
4 Plaintiff's body during the entire encounter.

5 Overall, Defendant is correct in asserting that this "trial presented a classic case of 'he
6 said, she said.'" (Dkt. #116 at 11). The fact that this trial required the jury to examine two
7 completely dichotomous versions of events is nothing unusual. In fact, it is precisely why our
8 system of jurisprudence relies on a jury to determine which version of events is true when a
9 case proceeds to trial. And in this particular case, there was more than sufficient evidence for
10 the jury to find that the Defendant's use of force was not justified.

11 **C. Damages**

12 Defendant also argues that the jury's award of \$35,000 in compensatory and \$25,000
13 in punitive damages to Plaintiff should be vacated. With respect to compensatory damages,
14 courts afford "*substantial deference* to a jury's finding of the appropriate amount of
15 damages." *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1435 (9th
16 Cir. 1996) (citation omitted) (emphasis added). "Unless the amount is grossly excessive or
17 monstrous, clearly not supported by the evidence, or based only on speculation or guesswork,
18 [courts] uphold the jury's award." *Harper v. City of Los Angeles*, 533 F.3d 1010, 1028 (9th
19 Cir. 2008) (internal quotations and citations omitted). A § 1983 plaintiff can recover damages
20 for "impairment of reputation, personal humiliation, and mental anguish and suffering."
21 *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986). Significantly, "[t]he
22 testimony of the plaintiff alone can substantiate a jury's award of emotional distress
23 damages." *Harper*, 533 F.3d at 1029 (citations omitted).

24 Here, there is nothing "grossly excessive or monstrous" about the jury's \$35,000
25 compensatory damage award. Plaintiff testified that he experienced physical pain, as
26 supported by his trip to the hospital following the incident. Plaintiff further testified that he
27 experienced significant emotional pain and suffering following the incident. This testimony
28 was corroborated by other witnesses Plaintiff's counsel called to the stand. Notwithstanding

1 this testimony, Defense counsel maintains that she was prohibited from completely
2 developing her theory that Plaintiff was experiencing multiple family and personal stressors
3 prior to the incident. However, the Court certainly provided Defense counsel with sufficient
4 time and leeway regarding this theory, highlighted by days two and three of the trial which
5 featured lengthy cross-examination of Plaintiff discussing these exact topics. Consequently,
6 the Court finds no justification in disturbing the jury's compensatory damage award.

7 With respect to punitive damages, Defendant argues that the Court should vacate the
8 \$25,000 award to Plaintiff. Defendant claims that the evidence is undisputed that Defendant's
9 training authorized him to use a taser when an arrestee is actively resisting arrest, and that this
10 training is consistent with the use of force standard currently being taught at the Washington
11 State Criminal Justice Training Academy. Defendant additionally indicates that case law
12 makes it clear that a taser device is an objectively reasonable use of force.

13 These arguments ignore the substance of this particular case. Regardless of
14 Defendant's training and whether it comports with current standards imposed by Washington
15 State, the issue confronted with this jury was whether, under the circumstances of this case,
16 Defendant violated Plaintiff's Fourth Amendment rights. Ultimately, the jury determined that
17 Defendant did indeed use excessive force, and therefore decided to make an award of punitive
18 damages.

19 In any event, the constitutionality of a punitive damages award is determined by
20 assessing: (1) the degree of reprehensibility; (2) the disparity between the harm suffered and
21 the punitive damages award; and (3) the difference between the remedy and the civil penalties
22 authorized or imposed in comparable cases. *BMW of North America, Inc. v. Gore*, 517 U.S.
23 559, 574-75 (1996) (the "*Gore* guideposts").

24 When considering reprehensibility, courts look to whether:

25 the harm caused was physical as opposed to economic; the tortuous conduct evinced
26 an indifference to or a reckless disregard of the health or safety of others; the target of
27 the conduct had financial vulnerability; the conduct involved repeated actions or was
28 an isolated incident; and the harm was the result of intentional malice, trickery, or
deceit, or mere accident.

State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003).

1 “Reprehensibility falls along a sliding scale, with acts and threats of violence at the
2 top, followed by acts taken in reckless disregard for others’ health and safety, affirmative acts
3 of trickery and deceit, and finally, acts of omission and mere negligence.” *Mendez v. County*
4 *of San Bernardino*, 540 F.3d 1109, 1120 (9th Cir. 2008) (internal quotations and citation
5 omitted).

6 In this case, Defendant’s conduct could clearly be interpreted as reprehensible. As
7 established above, Plaintiff was not a flight risk, was unarmed, and was surrounded by three
8 police officers. In addition, Plaintiff was not engaged in the commission of a serious crime,
9 and was present *inside* a police station when the tasing occurred. One of the police officers
10 even admitted that Plaintiff was “under control” prior to the tasing. As a result, tasing an
11 individual under such circumstances can certainly be considered as a “reckless disregard” for
12 another’s health and safety.

13 With respect to the second *Gore* guidepost, it is well-established that exemplary
14 damages must bear a “reasonable relationship” to compensatory damages. *See Gore*, 517
15 U.S. at 580 (citations omitted). Here, there is no significant discrepancy between the harm
16 suffered and the punitive damages award. In fact, the punitive damages award is below the
17 compensatory damages award. *See State Farm*, 538 U.S. at 425 (holding that although there is
18 no “bright-line ratio which a punitive damages award cannot exceed . . . few awards
19 exceeding a single-digit ratio between punitive and compensatory damages, to a significant
20 degree, will satisfy due process.”). An award of \$25,000 is certainly reasonable to both deter
21 and punish an officer’s conduct for employing excessive force in light of a \$35,000
22 compensatory damages award.

23 The last *Gore* guidepost requires the Court to consider any civil penalties authorized
24 or imposed in comparable cases. In this particular case, the amount awarded to Plaintiff is on
25 par, if not at the lower end, with other Fourth Amendment excessive force cases. *See, e.g.,*
26 *Frunz v. City of Tacoma*, 468 F.3d 1141, 1144 (9th Cir. 2006) (affirming a \$111,000 punitive
27 damages award by a jury in a § 1983 case involving claims for unlawful entry and excessive
28 force); *King v. Turner*, 2006 WL 4911728 (D. Minn.) (jury awarded \$15,000 in punitive

1 damages to § 1983 plaintiff who claimed a deputy used excessive force after grabbing
2 plaintiff's arm); *Omelogu v. Canizales*, 2006 WL 4990833 (N.D. Ill.) (jury awarded \$250,000
3 in punitive damages to § 1983 plaintiff who was dragged out of his dorm room). This
4 guidepost does not weigh in favor of vacating the \$25,000 punitive damages award.

5 In sum, Defendant has failed to show why a new trial should be ordered. There was a
6 reasonable basis for the jury's verdict in favor of Plaintiff, and the damages awarded by the
7 jury were not excessive. The award amount shall neither be vacated nor reduced.

8 **III. CONCLUSION**

9 Having reviewed the relevant pleadings, and the remainder of the record, the Court
10 hereby finds and ORDERS:

- 11 (1) "Defendant John Lievero's Motion for New Trial and Other Relief" (Dkt. #116) is
12 DENIED.
13 (2) The Clerk is directed to forward a copy of this Order to all counsel of record.
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15 DATED this 2 day of February 2009.

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18 RICARDO S. MARTINEZ
19 UNITED STATES DISTRICT JUDGE
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